

STATE OF MICHIGAN  
COURT OF APPEALS

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MARTHA SWAIN,

Plaintiff-Appellee,

v

RUSSELL SWAIN,

Defendant-Appellant.

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UNPUBLISHED

December 28, 2001

No. 226625

Monroe Circuit Court

LC No. 94-021220-DZ

Before: Meter, P.J., and Jansen and R. D. Gotham\*, JJ.

PER CURIAM.

Defendant appeals as of right from a default judgment for the division of property entered after the court denied a request to adjourn trial. We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

A motion to adjourn must be based on good cause. MCR 2.503(B)(1). An adjournment may be granted because of the unavailability of a witness or evidence, but “only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.” MCR 2.503(C)(1), (2). Such a motion must be brought “as soon as possible after ascertaining the facts.” MCR 2.503(C)(1). “The ruling on a motion for a continuance is discretionary and is reviewed for an abuse of discretion.” *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996). “The burden of proof is on the party asserting an abuse of discretion.” *In re Jackson*, 199 Mich App 22, 28; 501 NW2d 182 (1993).

Illness generally constitutes good cause for adjournments, *People v Lewis*, 160 Mich App 20, 32; 408 NW2d 94 (1987), and the first request for an adjournment due to the illness of a party should ordinarily be given careful consideration, although it is still left to the court’s discretion. *Stevens v N Z Graves Corp*, 210 Mich 585, 587; 177 NW 964 (1920). The court may properly deny the request where the party will never recover from his illness, *Lamoreaux v Eggleston*, 171 Mich 201, 203; 137 NW 77 (1912), where the party fails to submit evidence of his illness, *Stevens, supra* at 586, or the history of the case shows that the party does not intend to proceed with the action. *Id.* at 586-587.

The history of this case shows that neither party was interested in moving the case along until the court finally issued a scheduling order and forced them into it. Defendant then filed a

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\* Circuit judge, sitting on the Court of Appeals by assignment.

counterclaim and submitted a trial brief in advance of the original trial date, and tried to make it to court for the adjourned trial date. This was defendant's first request for an adjournment, he submitted letters from his doctor showing that he was seriously ill, and his own testimony was clearly material to his case. Although there was some speculation that defendant might not recover for some time, he only requested an adjournment of a week or two. We find that the denial of a reasonable request for an adjournment supported by good cause on speculation that defendant would die before he recovered constituted an abuse of discretion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter

/s/ Kathleen Jansen

/s/ Roy D. Gotham